Draft Environmental Code: Review of the Norms Governing Environmental Protection during Subsoil Use Operations

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There is no doubt that the Environmental Law norms need improvement. However, the review of the Draft Environmental Code (hereinafter "the Draft") raises some legal questions, primarily about the alignment of the Draft and the legislative acts provisions that govern the use of specific natural resources, such as land, water, subsoil etc. Thus, Clause 4, Article 2 of the Draft states that "the issues of protection and use of land, subsoil, water, ambient air, forests and other vegetation, fauna, environmental features that have a special environmental, scientific or cultural value, as well as of specially protected natural areas shall be regulated, **to the extent they are not regulated by this Code,** by relevant legislative and other regulatory legal acts of the Republic of Kazakhstan". It follows, therefore, that if the Draft Environmental Code is ratified as it stands now, its norms will prevail over the Land and Water Codes, the Law on Subsoil and Subsoil Use and the Law on Petroleum, not only in terms of the environmental protection but in the area of the relevant natural resources use too. Priority of the Environmental Code norms over the Land Code norms is also explicitly locked in a paragraph of Article 506 of the Draft whereby "the normative legislative acts governing the land relations passed before the Code comes into effect shall be used to the extent they do not contradict the Code". As for the norms of the land laws, priority of the Environmental Code in case of a conflict between the two is obvious due to the normative legislative acts hierarchy established by Article 4 of the Law on the Normative Legislative Acts. Certain norms of the Draft run contrary to the current Law governing the nature use relations.

Thus, Clause 1, Article 20 of the Draft states that "the right to use natural resources shall be granted to individuals and legal entities by local executive bodies in coordination with authorized bodies in the field of use and protection of any particular kind of natural resource, or **the Government of the Republic of Kazakhstan,** in accordance with the legislative acts on protection and use of any particular kind of natural resource". Clause 2, Article 23 of the Draft also states that "the nature use right shall be granted on the basis of an agreement (contract) finalized with the local executive body or **the Government of the Republic of Kazakhstan".** However, the current Law provides that a subsoil use contract should be finalized with a competent body except for a contract for common natural resources exploration, production and combined exploration and production (Article 8 of the Law on Subsoil and Subsoil Use; Article 6 of the Law on Petroleum). Clause 5, Article 23 of the Draft imposes a total ban on any nature use right transfer ("It shall be prohibited to transfer the nature use right from a nature user to another entity in any form"). Per Clause 1 of the above Article, "the right to nature use shall occur **only when it is granted directly by the Government or transferred under a universal legal succession procedure** in accordance with the civil law". The above referenced norms contradict the subsoil use laws that grant nature users the right to transfer the nature use right subject to the competent body's concurrence (Sub-Clause 6, Article 62, Clause 1, Article 14 of the Law on Subsoil and Subsoil Use; Clause 1, Article 53 of the Law on Petroleum). Article 5 of the Law on Subsoil and Subsoil Use states that "unless otherwise provided in the contract, mineral raw materials belong to the subsoil user by virtue of the property right (to a RK state-owned company – by virtue of the assets management or operation right). Clause 5, Article 20 of the Draft imperatively assigns to the nature user the pro-

perty right to "the natural raw materials extracted from the environment".

In essence, the Draft Environmental Code purports to set up a certain Natural Resources Legislative Base since it governs not only the environmental protection relations and rational use of natural resources, but also the relations stemming from their use. It also sets the Environmental Code's priority over other legislative acts governing the nature use relations, including the Codes.

Article 199 of the Draft states that the persons engaged in environmentally hazardous types of business activities shall be subject to compulsory insurance. Apart from the definition of the "environmentally hazardous type of business activity", the Draft also defines "the environmentally hazardous type of activity", "environmentally hazardous activity" (Article 8 of the Draft), and with regards to crude oil operations - "the environmentally hazardous types of work" (Article 356 of the Draft). There is no direct evidence to suggest that the environmentally hazardous types of work are bracketed with the environmentally hazardous types of business activity, since given the definition of the latter, they should include only such types of activities that the Draft directly subsumes under this category, or the ones included in list thereof approved by the Government.

Crude oil operations are not on the list of the environmentally hazardous types of business activities approved by the RK Government's Decree #19 dated January 8, 2004. The List, among other things, includes only the layout, construction and upgrade of the plants, structures and operation of other facilities within the State Reserve Zone in the north Caspian Sea (Clause 11).

Article 55 of the Law on Petroleum provides compulsory insurance of liabilities of the contractors engaged in the crude oil operations that covers environmental pollution and damage to third parties. However, the Draft stipulates compulsory insurance that does not cover just any damage to the environment and/or individuals and legal entities, but rather cases of environmental **emergencies** or damage to the life, health and/or assets of individuals and legal entities brought about by an environmental emergency.

An environmentally hazardous type of business activity, as implied by its definition, includes not only business activity proper, but also other activities of individuals and/or legal entities that result or may result in an environmental emergency. Any reference to a business activity in the above context is generally superfluous and incorrect.

Chapter 41 of the Draft outlines environmental requirements to the subsoil use. Article 354 of the Draft states that a favorable conclusion of environmental, and sanitation and epidemiological expert studies, as well as a nature use permit issued on the basis of the above, shall form the basis for the nature use operations. Appropriate environmental requirements make an integral part of the subsoil use contracts.

Article 355 of the Draft is called General Environmental Requirements to Subsoil Use. It sets forth a general requirement to comply with the environmental law at all stages of subsoil use (Clause 1), and the principal environmental requirements, that again include the requirement to use the subsoil as per the requirements of the RK environmental law (Sub-Clause 1, Clause 2), compliance with the environmental requirements during the industrial and domestic waste storage and disposal (Sub-Clause 10, Clause 2), and other requirements that are, from our perspective, not universally applicable; i.e. conservation of the land surface through special field development methods during open-cast mining (Sub-Clause 3, Clause 2). The Draft norms unduly often mention the environmental requirements needed to comply with the environmental law (environmental guidelines).

Article 356 of the Draft lists environmental requirements to the subsoil use operations that is, first, not exhaustive, and, second, applies exclusively to oil and gas production. The Draft has no specific environmental requirements to the solid minerals exploration or production.

A special chapter (46) of the Draft is dedicated to the mandatory requirements of the crude oil operations in the state reserve zone in the north part of the Kazakh Sector of the Caspian Sea. The Government sets the boundaries of the reserve zone in keeping with the law on the specially protected nature reserves. Article 399 of the Draft provides for marking out special sites within the reserve zone, where, alongside general restrictions, special temporary restrictions will affect certain crude oil operations, or even total bans will be imposed on all activities. Clause 2 of the above Article lists restrictions of specific operations or acts (e.g. aircraft flights at an altitude less than 1 km) in the specific areas of the reserve zone. These restrictions will remain in force until special normative acts based on the scientific justification of the zones come into effect. Apart from the north part of the Kazakh Sector in the Caspian Sea,

the Draft also looks at a water protection zone along the Caspian Sea shore, nature protection zone and protection areas around the seawater regions used by the population.

Moreover, apart from the general environmental requirements to all crude oil operations (that are evidently undertaken in the north Caspian Sea, hence, "all" refers to specific types of crude oil operations), Article 46 of the Draft details environmental requirements to its specific types (e.g. logging – Article 405 of the Draft; environmental restrictions imposed on wildcat appraisal drilling and production – Article 406 of the Draft etc.).

We believe that the Draft as a whole needs some serious fine-tuning. First of all, its internal disconnects should be addressed. Thus, Clause 4, Article 156 of the Draft states that it is the RK Government that establishes the environmental audit procedures. However, per Article 168 of the Draft, audit standards that include, among others, the audit procedures, shall be approved at the Republic Chamber of Auditors conference, and by the authorized Government body. Article 17 of the Draft sets the rights and obligations of the local government bodies, while Article 48 outlines their purview. We believe, however, that in the absence of the law on local government bodies, it is impossible to determine either their rights and obligations, or their purview, considering that the Draft invests these bodies with the rights that are outside their environmental functions. To be more specific, Article 17 of the Draft states that the local government bodies have the right "to totally dispose of the land parcels and common use facilities that have been either transferred to or purchased by them (sell, let, outsource for management etc.)". They are authorized "to set a fee for using common grounds and facilities". The local government bodies must also **"have a right of priority to use the nature resources located in their area,** and must **align** such use with other legal entities and individuals". In addition, the wording of these norms needs major improvements.

It would also make sense to incorporate into the economic mechanisms of environmental protection (Section V of the Draft) the formation of an Environmental Government Fund consolidating all environmental assessments (reinstate the Nature Protection Funds). To maintain a balance between the public's environmental and economic interests, it is recommended to review environmental assessments and natural resources use fees.

Article 439 of the Draft is a verbatim of an international Convention which is not appropriate, from our perspective.

Some definitions of the key concepts used in the Draft are not very good. For example, we disagree with the definition of industrial and domestic waste. Article 8 of the Draft states that "industrial and domestic wastes (wastes) mean any substances, materials, and objects in any aggregative state formed as a result of anthropogenic activities, which are not subject to further use in the place of their formation, of which the owner is getting rid, intends to get rid of, or must get rid of". For example, manufactured products may be categorized as waste since they are formed as a result of anthropogenic activities, are not subject to further use in the place of their formation, and their owner intends to get rid of them.

Article 155 of the Draft lists the reasons justifying a mandatory environmental audit (i.e. damage caused to the environment and/or health of the people, re-structuring of a legal entity, bankruptcy of legal entities in charge of strategic, trans-border and environmentally hazardous facilities). However, Clause 5, Article 170 states that "generally, a repeat mandatory environmental audit of an audit entity is conducted no earlier than 3 years following the previous audit, provided that over the expired period there have been no major modifications of the company's technologies, or changes in the nature of its environmental impact".

One can't help noting that the Draft includes a variety of technical norms; some of its provisions are not of a legislative, but rather of an information and recommendation nature. Thus, per Clause 4, Article 406 of the Draft, it is not recommended to penetrate the pre-salt pay zone or test wells with potentially extreme pressure or high H_2S content in harsh ice conditions in the sea. □